



Signed and Filed: September 29, 2004

Dennis Montali

DENNIS MONTALI
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re) Case No. 01-30923-DM
PACIFIC GAS & ELECTRIC COMPANY,) Chapter 11
Debtor.)

MEMORANDUM DECISION REGARDING ENFORCEMENT MOTION AND LATE CLAIM

I. Introduction

On August 26, 2004, this court held a hearing on the Omnibus Motion to Enforce Order Confirming PG&E's Plan of Reorganization ("Enforcement Motion") filed by debtor Pacific Gas & Electric Company ("PG&E") and on the Motion for Allowance of Amended Informal Proof of Claim and for Related Relief ("POC Motion") filed by Deborah Brooks ("Brooks"). The Enforcement Motion requested this court to issue orders compelling certain plaintiffs (including Brooks) who filed lawsuits against PG&E on prepetition claims to "dismiss their enjoined Lawsuits against PG&E or face sanctions." Brooks opposed the Enforcement Motion and filed the POC Motion, which PG&E opposed. The court took the POC Motion and the Enforcement Motion relating to Brooks under

1 advisement. For the reasons stated below, the court will deny
2 the POC Motion and grant the Enforcement Motion relating to
3 Brooks.

4 II. Discussion¹

5 Brooks filed a pre-petition complaint in state court against
6 PG&E based on claims arising during her employment with PG&E.
7 She did not, however, file a proof of claim in PG&E's bankruptcy
8 case prior to the claims bar date (September 5, 2001). In her
9 POC Motion, Brooks contends that (1) she has asserted an informal
10 proof of claim which is subject to amendment, (2) that her
11 failure to file a timely proof of claim was due to lack of notice
12 of the bar date, and (3) that even if her claim is late-filed,
13 she is entitled to participate in the distribution of PG&E's
14 "surplus" estate under 11 U.S.C. § 726(a)(3).² She asserts the
15 same arguments in opposition to the Enforcement Motion.

16 **A. Brooks Has Not Filed An Informal Proof of Claim**

17 Brooks filed a prepetition state court action on June 28,
18 2000; after filing its Chapter 11 bankruptcy petition, PG&E filed
19 a notice of stay in the state court action (on April 11, 2001)
20 and a later notice of termination of automatic stay (on April 14,
21 2004). In addition, after the bankruptcy petition date and prior
22 to the claims bar date, the following events occurred in the
23

24 ¹The following discussion constitutes the court's findings
25 of fact and conclusions of law. Fed. R. Bankr. P. 7052(a).

26 ²Unless otherwise indicated, all section and rule references
27 are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and the Federal
Rules of Bankruptcy Procedure, Rules 1001-9036.

state court case (according to the state court docket sheet):

- 1) 4/16/01 - Mailing: Panel of Arbitrator
- 2) 5/03/01 - Order to Arbitration, No Disposition
- 3) 5/03/01 - Order to Show Cause Re Arbitration (Mailing)
from 9/04/01 X-1 3:30 PM for 09/04/01 X-1 3:30 PM [sic]
- 4) 6/5/01 - Arbitrator Excused
- 5) 6/12/01 - Mailing: Panel of Arbitrators 6/12/01
- 6) 6/27/01 - Removed from Arbitration: Bankruptcy
- 7) 6/28/01 - Dropped from ARB Calendar
- 8) 6/28/01 - Dropped from ARB OSC Calendar
- 9) 6/28/01 - Dropped from ARB OSC Calendar
- 10) 6/28/01 - Plan I New Status Conference: Hearing Set for
2/1/02 at 9:00 AM in Dept 212
- 11) 6/28/01 - Order Setting Status Conference (Mailing)
from 2/01/02 X-1 9:00 AM for 2/1/02 X-1 9:00 AM [sic]

Brooks contends that her prepetition complaint, the written communications by PG&E to the state court, and the above-described post-petition activity by the state court constitute an informal proof of claim which can now be amended.

The court disagrees. In order to establish that it has submitted an informal proof of claim, a creditor must establish the existence "of each of the elements that have consistently been required by the cases for over seventy-five years: (1) presentment of a writing; (2) within the time for the filing of claims; (3) by or on behalf of the creditor; (4) bringing to the attention of the court; (5) the nature and amount of a claim asserted against the estate." Dicker v. Dye (In re Edelman), 237 B.R. 146, 155 (9th Cir. BAP 1999).

1 Here, the only writing presented by or on behalf of Brooks
2 was the prepetition state court complaint; it was not presented
3 during the time period for filing claims (after the petition date
4 and before the claims bar date) and was not brought by Brooks to
5 the attention of the bankruptcy court or to any person connected
6 with the administration of the bankruptcy case during the
7 relevant time. See, Fed. R. Bankr. P. 5005(c). Brooks did not
8 refer to any claim in any papers, pleadings, or correspondence
9 submitted in connection with the bankruptcy case. Under Edelman,
10 therefore, Brooks' prepetition complaint and the subsequent
11 communications between PG&E and the state court do not constitute
12 an informal proof of claim. Id. at 155; see also In re Kenitra,
13 Inc., 53 B.R. 152, 154-55 (Bankr. D. Ore. 1985), aff'd, 64 B.R.
14 841 (9th Cir. BAP 1986), and In re Rolyn, 266 B.R. 453, 454-55
15 (Bankr. N.D. Cal. 2001) (noting that a prepetition lawsuit might
16 constitute an informal proof of claim where the plaintiff refers
17 to it in papers or pleadings submitted to the bankruptcy court
18 prior to the claims bar date; generally, however, "prepetition
19 lawsuits do not meet the requirements of an informal proof of
20 claim, as they do not establish a current intent to hold the
21 debtor's estate liable").

22 **B. Brooks Has Not Established Lack of Notice**

23 PG&E has presented evidence that its claims and noticing
24 agent served the claims bar date notice on Brooks and her state
25 court counsel by United States mail; in addition, it has
26 presented evidence that the claims bar date notices mailed to
27
28

1 Brooks and her counsel were not returned as undeliverable.³ In
2 response, both Brooks and her state court counsel filed
3 declarations stating that they never received notice of the
4 claims bar date.

5 The proof of service filed by PG&E's claims and noticing
6 agent gives rise to a presumption of receipt (also known as the
7 "mailbox rule") by Brooks and her state court counsel. Moody v.
8 Bucknam (In re Bucknam), 951 F.2d 204, 207 (9th Cir. 1991) ("Mail
9 that is properly addressed, stamped and deposited into the mails
10 is presumed to be received by the addressee. [Citation omitted].
11 A certificate of mailing stating that notice of the bar dates was
12 sent to all creditors or proof of a custom of mailing, raises the
13 presumption that notices were properly mailed and therefore
14 received."), quoting Osborn v. Ricketts (In re Ricketts), 80 B.R.

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16 ³PG&E has filed declarations showing proof of service on
17 Brooks and her state court counsel, but Brooks contends that the
18 declaration of Robert L. Berger (the president of the claims
19 agent) cannot authenticate a proof of service signed by his
20 employee (Craig A. Osborne) and is hearsay. The court overrules
21 Brooks' evidentiary objection. Berger's declaration indicates at
22 paragraph 3 that he was personally involved in the management of
23 claims and noticing processes; it also describes the process for
24 mailing notices and processing claims. Consequently, despite
25 Brooks' contention, Osborne need not testify to authenticate the
26 proof of service. See Board of County Commissioners of Sedgwick
27 County v. Coleman American Properties, Inc. (In re American
Properties, Inc.), 30 B.R. 247, 250 (Bankr. D. Kan. 1983) ("Proof
of custom of mailing is sufficient to carry the burden of proper
mailing, and proof of customary and usual computer procedures is
sufficient to show adherence to a usual and customary procedure.
The mailing employee need not testify.") (citations omitted and
emphasis added). In any event, the proof of service falls under
the business records exception to the hearsay rule (Fed. R. Evid.
803(6)) as well as the residual hearsay exception (Fed. R. Evid.
807).

1 495, 498-99 (9th Cir. BAP 1987). This presumption "can only be
2 overcome by clear and convincing evidence that the mailing was
3 not, in fact, accomplished." Id. (emphasis added).

4 Here, Brooks has presented two declarations that she and her
5 counsel did not receive the notice of the claims bar date. Under
6 Ninth Circuit authority, this is not "clear and convincing"
7 evidence that will overcome the presumption of receipt. "If a
8 party were permitted to defeat the presumption of receipt of
9 notice resulting from the certificate of mailing by a simple
10 affidavit to the contrary, the scheme of deadlines and bar dates
11 under the Bankruptcy Code would come unraveled. For this reason,
12 an allegation that no notice was received does not, by itself,
13 rebut the presumption of proper notice." Id. As noted by the
14 Bankruptcy Appellate Panel in CUNA Mut. Ins. Group v. Williams
15 (In re Williams), 185 B.R. 598, 600 (9th Cir. BAP 1995), the "law
16 in this circuit is that denial of receipt does not rebut the
17 presumption."

18 Here, the weight of the evidence favors the presumption.
19 PG&E's claims agent filed a contemporaneous certificate of
20 service showing that Brooks and her counsel had been served. The
21 claims agent had set up a process for gathering and recording
22 returned, undeliverable mail; the notices sent to Brooks and her
23 counsel were not recorded as returned or undeliverable.⁴ Under
24 governing Ninth Circuit law, the declarations of Brooks and her

26 ⁴In fact, Brooks' counsel admitted that he received a
27 discharge letter that was sent to him at the same address shown
28 on the proof of service of the claims bar date notice.

counsel do not constitute "clear and convincing" evidence sufficient to overcome the presumption of receipt.⁵

C. Section 726(a)(3) is Inapplicable

Brooks argues that since PG&E is solvent, the court should consider the estate as a surplus estate under section 726(a)(3),⁶ thus allowing late-filed claims to participate in any distribution. Brooks cites Global Western Dev. Corp. v. Northern Orange County Credit Serv., Inc. (In re Global Western Dev. Corp.), 759 F.2d 724 (9th Cir. 1985), for the proposition that late-filed claims should be allowed in a surplus chapter 11 case.

As this court noted at oral argument, Brooks' argument is unavailing. Section 726 does not apply to chapter 11 cases; section 726 falls within subchapter II ("Collection, Liquidation, and Distribution of the Estate") of chapter 7 and as such is limited to chapter 7 cases. See 11 U.S.C. § 103(b) ("Subchapters I and II of chapter 7 of this title apply only in a case under such chapter."). In addition, Global Western is inapplicable because it was decided under the former Bankruptcy Act.⁷

⁵Two declarations, rather than one, does not make the evidence sufficiently "clear and convincing" to overcome the mailbox rule.

⁶Section 726 governs the order of distribution of property of a chapter 7 estate. If any assets remain after timely filed claims are paid, estate property shall be distributed "in payment of any allowed unsecured claim proof of which is tardily filed under section 501(a) of this title, other than a claim of the kind specified in paragraph (2)(C) of this subsection[.]" 11 U.S.C. § 726(a)(3).

⁷In response to PG&E's observation that Global Western is an inapplicable Bankruptcy Act case, Brooks cited two inapplicable

Moreover, the only Bankruptcy Code case on point is highly persuasive even though it is not binding. In Banco Latino Int'l v. Gomez-Lopez (In re Banco Latino Int'l), 310 B.R. 780, 785-86 (S.D. Fla. 2004), a district court held that a bankruptcy court abused its discretion in allowing a late-filed claim under section 726 in a chapter 11 case because (1) section 726 does not apply in a chapter 11 case and (2) the bankruptcy court improperly disregarded the "excusable neglect" standard. As the

cases to support its theory that Global Western and section 726 apply. The first (Venhaus v. Wilson (In re Wilson), 96 B.R. 257, 263 (9th Cir. BAP 1988)) holds that in a Chapter 7 case, section 726 does not authorize payment of a late-filed claim when the claimant's tardiness has caused prejudice to the debtor or other creditors. The Wilson court simply cites Global Western in dicta for the proposition that "Global makes clear that equitable considerations are appropriate in determining whether to allow a late filed claim when there is a surplus in the estate." The second case (In re Argonaut Fin. Servs., 164 B.R. 107, 115 (N.D. Cal. 1994)) involved section 365 of the Bankruptcy Code. The lessors had not received notice of the bankruptcy and thus filed a late objection to the deemed rejection of their lease. In holding that the lessors could have additional time to file whatever motions were necessary to protect their rights, the Argonaut court cited Global Western for the proposition that "as courts of equity, bankruptcy courts 'will look through the form to the substance of any particular transaction and may contrive new remedies where those in law are inadequate.'"

Here, however, a remedy has been provided: creditors may file late claims in a chapter 11 case when they have demonstrated excusable neglect or lack of notice. This court will not use its equitable powers and apply a section (section 726) that is limited to chapter 7 cases to allow a creditor to avoid the consequences of filing a late claim in a chapter 11 case absent excusable neglect or lack of notice. "[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988).

1 district court noted: "[T]o the extent the bankruptcy court
2 relied on the policies underlying [section] 726 to justify its
3 finding [that a creditor could file a late claim in a solvent
4 chapter 11 case and be paid as if section 726 applied], the court
5 disregarded the policies supporting the application of the
6 "excusable neglect" standard of [Rule] 9006(b)(1) before
7 deviating from the bar date." Id.

8 Because none of the Bankruptcy Code cases cited by Brooks is
9 on point and because the only Bankruptcy Code case on point cited
10 by the parties (Banco Latino, 310 B.R. at 785-86) is persuasive,
11 Brooks' section 726 arguments are overruled.

12 III. Disposition

13 Because Brooks has not filed or submitted an amendable
14 informal proof of claim, because section 726 should not be
15 applied in a chapter 11 case, and because Brooks has not overcome
16 the presumption of receipt of the notice of the claims bar date,
17 the court will deny her POC Motion and grant PG&E's Enforcement
18 Motion as to her state court lawsuit. PG&E's counsel should
19 submit orders denying the POC Motion and granting the Enforcement
20 Motion as to Brooks' lawsuit, both for the reasons set forth in
21 this memorandum decision. Counsel should comply with B.L.R.
22 9021-1 and 9022-1.

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24 *** END OF MEMORANDUM DECISION ***
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